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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

DONALD L. WILKINS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	
A. Indictment, Sentence, and Appeal	3
B. Trial Developments Relevant to This Petition	4
Reasons for Granting the Writ	6
Conclusion	27
Appendices	
A. Opinion Below	1a
B. Judgments Below	19a
(1) Judgment in District Court	19a
(2) Judgment in Court of Appeals	20a
(3) Judgment on Petition for Rehearing	21a
C. Statistical Summary of Trial Transcript	22a

CITATIONS

CASES:

Berkovitz v. United States, 213 F. 2d 468 (5th Cir. 1954)	10
Braswell v. United States, 200 F. 2d 597 (5th Cir. 1952)	27
Commissioner v. Bilder, 369 U.S. 499 (1962)	16
Fahy v. Connecticut, 375 U.S. 85 (1963)	18, 22
Flemister v. United States, 260 F. 2d 513 (5th Cir. 1958)	20

Page

Forster v. United States, 237 F. 2d 617 (9th Cir. 1956) 12, 13
Hardy v. United States, 335 F. 2d 288 (D.C. Cir. 1964) 19
Hirabayashi v. United States, 320 U.S. 81 (1943) 21
Holland v. United States, 348 U.S. 121 (1954) 16
Imholte v. United States, 226 F. 2d 585 (8th Cir. 1955) 14
Jones v. United States, 366 U.S. 213 (1961) 16
Jones v. United States, 338 F. 2d 553 (D.C. Cir. 1964) 24
Kotteakos v. United States, 328 U.S. 750 (1946) 22, 23, 24, 27
Lawn v. United States, 355 U.S. 339, rehearing denied, 355 U.S. 967 (1958) 22
Little v. United States, 73 F. 2d 861 (10th Cir. 1934) .. 18, 27
Mann v. United States, 319 F. 2d 404 (5th Cir. 1963), cert. denied, 375 U.S. 986 (1964) 8, 9, 10, 11, 13
McCandless v. United States, 298 U.S. 342 (1936) 18
Oliver v. United States, 335 F. 2d 724 (D.C. Cir. 1964), cert. denied sub nom., Crump v. United States, 379 U.S. 980 (1965) 23
San Fratello v. United States, 340 F. 2d 560, rehearing denied, 343 F. 2d 711 (5th Cir. 1965) 22
Sherwin v. United States, 320 F. 2d 137 (9th Cir. 1963), cert. denied, 375 U.S. 964, rehearing denied, 376 U.S. 946 (1964) 10, 11, 12, 13, 14
Smith v. United States, 335 F. 2d 270 (D.C. Cir. 1964) 21, 25
Spies v. United States, 317 U.S. 492 (1943) 15, 16
United States v. Barash, 365 F. 2d 395 (2d Cir. 1966) .. 14
United States v. Denton, 336 F. 2d 785 (6th Cir. 1964) 14
United States v. Dressler, 112 F. 2d 972 (7th Cir. 1940) 18
United States v. Haupt, 136 F. 2d 661 (7th Cir. 1943) .. 27
United States v. Johnson, 337 F. 2d 180 (4th Cir. 1964), aff'd, 383 U.S. 169 (1966) 19
United States v. Releford, 352 F. 2d 36 (6th Cir. 1945), cert. denied, 382 U.S. 984 (1966) 14
United States v. Simone, 205 F. 2d 480 (2d Cir. 1953) .. 26
United States v. Trenton Potteries Co., 273 U.S. 392 (1927) 21
United States v. Wilkins, Criminal No. 10844, 4th Cir., October 31, 1967 ..... 1, 20, 22
Whitfield v. Ohio, 297 U.S. 431 (1936) 22

Page

CONSTITUTIONAL PROVISION:

U.S. Const., Amend. VI 2

STATUTES:

18 U.S.C. § 281 (1964) 20

26 U.S.C. § 7201 (1964) 3

28 U.S.C. § 1254 (1964) 2

MISCELLANEOUS:

Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39 14

SUP. CT. R. 19(1) 2

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on October 31, 1967 (No. 10844).

OPINIONS BELOW

There was no formal opinion of the United States District Court for the Eastern District of Virginia. The opinion of the Circuit Court of Appeals has not yet been reported, but it is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 31, 1967. A timely petition for rehearing en banc filed November 30, 1967, was denied on December 8, 1967. The jurisdiction of this Court is invoked under the provisions of 28 U. S. Code § 1254 (1) and Rule 19(1) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

The instant petition presents the following questions for consideration:

> Whether substantial conflict requiring resolution exists among the decisions of Courts of Appeals concerning the validity of jury instructions, given in primary and supplemental instructions at Wilkins' trial, tending to shift the burden of proof to the defendant and establishing a fallacious criterion for the ascertainment of specific intent.
>
> Whether Wilkins' Sixth Amendment right to be tried by an impartial jury was offended and abridged by the receipt of voluminous improper prejudicial evidence and the trial court's seriously erroneous instructions thereon.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Internal Revenue Code § 7201, 26 U.S.C. § 7201 (1964)

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

A. Indictment, Sentence, and Appeal

The defendant, petitioner herein, Donald L. Wilkins, was indicted on December 8, 1965, in the United States District Court for the Eastern District of Virginia in four counts for attempting to evade and defeat income taxes in each of the years 1960-63 in violation of the provisions of 26 U.S.C. § 7201. He pleaded not guilty and thereafter moved for dismissal of Count One, asserting that said count was based upon his 1960 tax return, whereas the income involved was essentially received in and properly taxable to the years 1956, 1958, and 1959. Alternatively, he moved to sever the trial on Count One from the remaining three counts on the grounds that the transactions involved in Count One were different from those comprehended by Counts Two, Three, and Four (collectively) and that such transactions would prejudice the jury against him on the remaining three counts. The motion to dismiss Count One or, alternatively, for severance was denied.

Trial commenced before a jury on May 9, 1966. The jury returned a verdict of guilty on each of the four counts on May 13, 1966. Motions for judgment of acquittal at the conclusion of the Government's case and at the close of the case were denied. A motion for judgment of acquittal notwithstanding the verdict or for a new trial was likewise denied. On August 8, 1966, Wilkins was sentenced to confinement for eighteen months on each count with twelve months on each count to be suspended, the sentences to run concurrently.

The United States Court of Appeals for the Fourth Circuit, on October 31, 1967, set aside the defendant's conviction and sentence on Count One and ordered a new trial on that count.[1] The convictions and sentences on Counts Two, Three, and Four were affirmed. Wilkins filed a Petition for Rehearing En Banc on November 30, 1967, which was denied without opinion by the Court of Appeals on December 8, 1967.[2]

B. Trial Developments Relevant To This Petition

The detailed facts of the case, as contained in the opinion of the Fourth Circuit Court of Appeals (associated herewith as Appendix A), are not essentially disputed, and will be treated only as germane to the considerations raised by this petition.

Count One of the indictment alleged a willful attempt to evade the payment of income taxes for the year 1960. The Government's proof at trial, however, related largely to income found by the Court of Ap-

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[1] Appendix B(2), *infra*, p. 20a.

[2] Appendix B(3), *infra*, p. 21a.

peals to have been received by Wilkins from lot sales and a condemnation proceeding in the years 1956-1959 and hence "not taxable to him in the prosecution year, 1960". (App. A, 7-8).

Count One unquestionably embraced the dominant theme of the Government's case[3] and evidence on this point constituted the vast majority of the evidence at trial. There is appended hereto (as Appendix C) an index and brief statistical analysis of the stenographic transcript of the trial. This analysis confirms that the great preponderance of the Government's entire case was devoted to Count One. For example, considering only the Government's *direct* case, there were 24 witnesses, of which 13 testified as to Count One exclusively. Of the 51 exhibits introduced by the Government, 30 relate to Count One, 19 relate to Counts Two, Three and Four, and 2 relate to all counts. Testimony of Government witnesses covers 182 pages of the trial transcript, of which 130 pages relate to Count One. The closing argument by the attorney for the Government fills 24 pages of the trial transcript; of these 24 pages, 17 are devoted to Count One. Thus, the Government's total direct case fills 242 pages of the trial transcript with 167 pages (69%) thereof devoted to Count One.

In instructing the jury, the trial court commented as follows concerning the extensive incompetent and

---

[3] In fact, the alleged understatement of income from the sale of the lots (in years prior to 1960) is what prompted the I.R.S. agent to recommend prosecution in this case in the first place (R-Vol. VII, 45). [This citation is to the Transcript of Record as certified by the Court of Appeals, volume and page. For convenience, all references to the trial record will be in this form].

improper evidence that had been received concerning income in years prior to the year of indictment:

> "Count 1 is the count where he is charged, and there is evidence, in fact, through his attorney, for practical purposes, he has admitted that there is a considerable amount of taxes due to the United States; that he didn't report his taxes correctly, and that he failed to state his income, understated his income, for quite a substantial amount of money, and *I am referring, mainly, to the income received from the sale of subdivision lots and condemnation proceedings . . .*" (R-Vol. IX, 11-12) (Emphasis added).

This petition addresses itself to the prejudicial impact upon the entire case of the foregoing extensive incompetent and improper evidence adduced before the jury and commented upon, as indicated above, by the trial court.

Further, this petition seeks review of hereinafter specified jury instructions, the validity of which are the subject of pronounced conflicts among Circuit Courts of Appeals.

REASONS FOR GRANTING THE WRIT

Grant of the writ here sought is essential to review and resolve basic conflicts among Circuit Courts of Appeals on fundamental questions of Constitutional proportions affecting the administration of justice in Federal courts. Specifically involved are conflicts among circuits related to (I) the validity of jury instructions in Federal criminal cases tending to shift the burden of proof to the defendant and establishing a fallacious criterion for the ascertainment of specific

intent; and (II) whether, in a multiple count indictment, the Sixth Amendment right of a defendant to a trial before an impartial jury is offended by the receipt in evidence of voluminous improper and gravely prejudicial evidence, taken with grossly improper instructions based on such prejudicial evidence, under one count of the indictment.

I

A Pronounced and Recurring Conflict Obtains Among Courts of Appeals in Assessing the Validity of Certain Instructions, Given at Wilkins' Trial in the Primary Charge and Repeated in Supplemental Instructions, Bearing Upon Intent and Burden of Proof

In its initial instructions to the jury, the trial court, after properly charging that proof of specific intent beyond a reasonable doubt was required in the instant case, thereupon instructed as follows:

> "As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or a contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences, which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused." (R.-Vol. VIII, 165).

After the jury had retired to consider its verdict, the court received a note from the foreman asking that it define again "willful intent to defraud" and give the terminology of the "second, third, and fourth indict-

ments" (R.-Vol. VII, 4). Thereupon, the court repeated in aggravated terms the foregoing instruction, in the particular context of the jury's confusion as to what constituted "willful intent to defraud", saying:

> "As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted, and the one that I am referring to there is like anybody else would be, it is like you members of the jury, what you would naturally do under the same identical similar circumstances." (R-Vol. IX, 15-16).

Petitioner, relying on *Mann* v. *United States,* 319 F. 2d 404 (5th Cir. 1963), *cert. denied,* 375 U.S. 986 (1964), challenged the foregoing instructions as clear error, as recognized by the Fourth Circuit (App. A, 15):

> "Defendant contends that the second sentence of this instruction, beginning with the words 'so, unless the evidence in the case . . .' tended to shift the burden of proof to defendant to come forward with evidence that he did not intend the natural and probable consequences of his acts. In addition, defendant asserts that an essential element of a violation of 26 U.S.C. § 7201 is specific intent but that the instruction deals with the average person rather than the particular defendant, Wilkins."

In *Mann, supra,* the court reversed a tax conviction by reason of an instruction[4] virtually identical with the foregoing instruction, despite a holding that there was substantial evidence to support the conviction. In doing so, the Fifth Circuit held such an instruction to be clear error. Commenting on the gravity of the error, the court said:

> "... [T]he effect of that portion of the charge was to make the jury aware of a certain factual hypothesis and to instruct them that if they believe this hypothesis, they were authorized, absent opposing evidence, to infer that Dr. Mann's intent was tax evasion. This he contends, is tantamount to an incriminating presumption which the jury, absent opposing evidence, could use as a substitute for proof. We agree."
>
> * * *
>
> "When the words 'so unless the contrary appears from the evidence' were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If any inference from a fact or a set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places the burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything

[4] The instruction in the *Mann* case was as follows (at 407):

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results."

* * *

"Under the instruction here involved, the jury is invited to speculate as to what any other person similarly situated to Dr. Mann with like knowledge would reasonably have expected to be the consequences of the conduct under consideration as shown by the evidence. The test is whether Dr. Mann himself willfully attempted to evade or defeat the tax. . . . [the instruction] conflicted with the overriding presumption of innocence with which the accused is endowed under the law." (At 408-410).

The court in *Mann* lastly held that this charge could not be cured by reading the instruction as a whole since "[i]nstructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one." (*Id.* at 410). See, too, *Berkovitz* v. *United States,* 213 F. 2d 468 (5th Cir. 1954).

The Fifth Circuit holding in *Mann* is submitted as sound principle squarely in conflict with the Fourth Circuit holding in the instant case, a fact candidly recognized by the court itself (App. A, 15):

"It is true that in *Mann* this identical instruction was held to constitute reversible error even though no exception was made at trial."

The observation by the Fourth Circuit (App. A, 16) that the challenged instruction has been recently approved by the Ninth Circuit in *Sherwin* v. *United States,* 320 F. 2d 137 (9th Cir. 1963), *cert. denied,* 375 U.S. 964 (1964), only serves to highlight the pronounced conflict among circuits on this vital question.

A critical analysis of the *Mann* and *Sherwin* decisions compels the conclusion that under the rationale of either case the instruction here at issue—in a case requiring proof of specific intent—constituted plain error. *Sherwin* does not constitute a blanket affirmation of the type of instruction given below. In point of fact, a fair construction of the opinion in *Sherwin* suggests that the court was vitally concerned with the critical danger implicit in such an instruction but affirmed only by reason of an extraordinary if not unique *total* charge which, in its view, served to counter the prejudicial potential of the instruction complained of.

The instruction in *Sherwin* (320 F. 2d at 148) was virtually identical to that in *Mann* and that given by the trial court in the instant case. It must be noted, however, that the court in *Sherwin* dwelt at extraordinary length on the assertedly protective nature of the total instructions, observing, *inter alia,* that:

> ". . . [the instruction complained of] came fairly early in the course of a lengthy and extended charge. [(the charge occupies 40 pages in the record and the instruction in question appeared in the twelfth page)]" (at 149).
>
> * * *
>
> "The instructions proceeded to advise the jury *again and again* as to the requirement that the Government prove beyond a reasonable doubt the willfulness and the specific intent to evade or defeat the tax." (Emphasis added)
>
> "[after intervening instructions on other matters] . . . the court *again* returned to the questions of willfulness and intent and repeatedly called the attention of the jury to the requirement of proof of specific intent to attempt to evade and defeat taxes." (Emphasis in original)

> "Our consideration of the instructions taken as a whole compels us to say that in view of this *massive repetition* of instructions with respect to the requirement of proof of willfulness [we will affirm]." (Emphasis added) (at 150)

> "Where, as here, the trial court *over and over again* correctly charged the jury as to the necessity of proving willfulness and specific intent, and that such must be proven beyond a reasonable doubt [we will affirm]." (Emphasis added) (at 151)

Thus, it is beyond question that the court in *Sherwin* affirmed only by reason of an exhaustive and extraordinary over-all charge deemed adequate by the court to vitiate the possibility that the defendant would be prejudiced by the improper "intent" instruction there—and here—in question. The over-all charge in the instant case bears not the slightest qualitative or quantitative resemblance to that described in *Sherwin;* and it is manifest that the safeguards held to exist in *Sherwin* are not present here. Thus, although petitioner does not concede the correctness of the *Sherwin* decision, it is clear that the essential and material facts upon which that decision turned do not here obtain. Thus, it is tolerably clear that given the charge in the instant case the *Sherwin* court would be compelled to reverse.

The foregoing conclusion finds additional support in the *Sherwin* court's reference (n. 23 at 150) to the case of *Forster* v. *United States,* 237 F. 2d 617 (9th Cir. 1956). In *Forster,* as here, the jury requested supplemental instructions subsequent to entering upon its deliberations. Although the type of supplemental instruction given in *Forster* was not identical to that given here, the Ninth Circuit reversed, noting that the

supplemental instruction — perhaps non-prejudicial otherwise—"... occurred at too critical a time. In the posture it entered it came into too bright a light. It did not run in a long chorus line. Here to let it stand would be to endorse the doubtful proposition that jurors disregard instructions anyway" (237 F. 2d at 621). Significantly, in the instant case, the jury, during its deliberations, specifically requested the trial court to "define again 'willful intent to defraud' "—the *sine qua non* of the entire prosecution. Thereupon, the court repeated, virtually verbatim, the "intent" instruction initially given. That the jury had focused upon and was concerned with the concept of "intent" was manifest from the fact of its inquiry. That the supplemental instruction "occurred at too critical a time" and "came into too bright a light" to be held non-prejudicial is equally manifest.

In sum, it is apparent that the Ninth Circuit would be compelled to reverse by reason of the instruction here at issue—this not in spite of but rather *consistent with* its decision in *Sherwin* and its observations in *Forster*.

The court in *Mann* noted pertinently that an instruction such as that given below "conflicted with the overriding presumption of innocence with which the accused is endowed under the law" (319 F. 2d at 409) and, in conclusion, held that:

> "... it is never permissible to leave the jury with the idea that it becomes the duty of the defendant to establish his innocence. The charge in this case may very well have had that effect, and as such, we cannot allow the conviction to stand" (319 F. 2d at 410).

It is fairly to be stated that the questioned instruction has consistently precipitated conflicts and confusion and has been a prolific source of appeals. Indeed, even where the instruction has been found not to require reversal, it has been necessary for the courts to explain away the impact of the instruction by reference to other circumstances, as in *Sherwin, supra.* Where sustained, its impact has been characterized as "clumsy and inartistic", *United States* v. *Releford,* 352 F. 2d 36 (6th Cir. 1965) *cert. denied,* 382 U.S. 984; "confusing", *United States* v. *Denton,* 336 F. 2d 785, 788 (6th Cir. 1964); a "platitude", *United States* v. *Barash,* 365 F. 2d 395, 402 (2d Cir. 1966); and the Eighth Circuit has said that it is better not to give the instruction in a case where intent is not inherent in the act itself. *Imholte* v. *United States,* 226 F. 2d 585, 591 (8th Cir. 1955).

The need for review by this Court is highlighted by the observation of the Fourth Circuit (App. A, 15-16) that "a substantially similar instruction is favorably regarded by the writer of a manual of instructions employed by many federal judges" [referring to Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 78 (1961)]. When an instruction fraught with conflict and confusion has found its way into a manual of instructions, doubtless referred to routinely by trial courts, the time is ripe for this Court to review and resolve the conflict. Particularly is this true where involved is the basic principle that guilt is subjective and personal to the defendant and may not be found vicariously through an inference related to the reactions of others to acts done or omitted, and that the burden of proof may not be shifted to the defendant to overcome an inference

based upon what others "standing in like circumstances and possessing like knowledge" would have done.

The pervasive quality of the error implicit in the questioned instruction is well epitomized in this case. As developed *infra,* in its supplemental instructions to the jury, the trial court erroneously stated, in commenting on *inadmissible* evidence, that Wilkins had "admitted that there is a considerable amount of taxes due the United States; that he didn't report his taxes correctly, and that he failed to state his income, understated his income, for quite a substantial amount of money . . ." Wilkins had made no such admission and, as stated, the trial court was instructing on the basis of inadmissible evidence, as found by the Fourth Circuit. When the trial court thereupon, also in its supplemental instructions, told the jury that, unless the evidence leads the jury to a different or contrary conclusion, "it is reasonable to infer that a person ordinarily *intends* all of the natural and probable consequences of acts knowingly done," it effectively by instructions established the whole of the Government's case; i.e., that Wilkins had *intentionally* understated his income. Moreover, the impact of the instruction clearly placed upon the defendant the burden of proving a different or contrary conclusion from the evidence.

The challenged instructions—permitting a *constructive* finding of specific intent—is peculiarly misplaced in a criminal tax case involving an alleged *attempt* to evade taxes. This Court has held that in such cases an affirmative act of the *defendant* apart from the understatement of income, is required from which intent and willfulness may be found. *Spies* v. *United States,*

317 U.S. 492, 497-499 (1943). As expressed in *Jones* v. *United States,* 366 U.S. 213, 221 (1961):

> "In Spies v. United States, 317 U.S. 492, 499, 63 S. Ct. 364, 368, 87 L. Ed. 418, the Court said that § 145 (b) of the 1939 Code embodied 'the gravest of offenses against the revenues,' and stated that willfulness must therefore include evil motives and want of justification in view of all the circumstances. Id. 317 U. S. at page 498, 63 S. Ct. at page 367. Willfulness 'involves a specific intent which must be proven *by independent evidence and which cannot be inferred from the mere understatement of income.*' Holland v. United States, 348 U. S. 121, 139, 75 S. Ct. 127, 137, 99 L. Ed. 150." (Emphasis added).

There is thus a clear need for a uniform rule on a fundamental question affecting the administration of justice in Federal criminal cases. In consequence thereof, the instant petition for a writ of certiorari should be granted. *Commissioner* v. *Bilder,* 369 U.S. 499 (1962).

II

The Sixth Amendment Right of Petitioner Wilkins To Be Tried by an Impartial Jury Was Offended and Abridged by the Receipt in Evidence of Voluminous Improper Prejudicial Evidence Under Count One and the Trial Court's Gravely Erroneous Instructions Thereon

The Fourth Circuit Court of Appeals has ruled that the Government's prosecutive theory under which income for the years prior to 1960 (the tax year covered by Count One of the indictment) was included in Count One was erroneous as a matter of law and that all of the extensive evidence relating to that income was inadmissible and prejudicial to the defendant. Moreover, the appeals court found that this "error was com-

pounded by the court in its charge to the jury. . . ." (App. A, 10). The court said (App. A, 11):

> "Defendant argues that the introduction of so much improper evidence, the permitted comments thereon and consideration thereof gravely prejudiced the jury against him. We find sufficient merit in this argument from which to conclude that the conviction of defendant on Count One should be set aside and a new trial on that Count should be awarded."

The Fourth Circuit, however, went on to hold (App. A, 18):

> "Defendant contends that the court's error as to the admission of evidence with respect to the offense charged in Count One was so great as to prejudice the jury in its consideration of the remaining counts. However, in view of the fact that there was substantial independent evidence to support the defendant's convictions on Counts Two, Three and Four, we think the taint attaching to the presentation of Count One was not so great as to permeate or materially affect the convictions on the remaining counts."

In consideration of the foregoing, this case presents a graphic instance where the appeals court has recognized that extensive prejudicial evidence was received and prejudicial instructions were given on Count One of the indictment. Yet the court washes out these prejudicial factors or "taint" by the expression of a naked belief, without more, that such considerations "were not so great as to permeate or materially affect the conviction on the remaining counts." The correct standard, however, is not whether judicial matter has not been shown to have affirmatively "permeated" or "materially affected" a case but rather whether, within

the range of reasonable possibility, the prejudicial evidence (and instructions), may have contributed to the conviction. *Fahy* v. *Connecticut,* 375 U.S. 85, (1963). Moreover, it must affirmatively appear that the prejudicial matter did not in fact influence the jury. *McCandless* v. *United States,* 298 U.S. 342, 347 (1936); *United States* v. *Dressler,* 112 F. 2d 972, 978 (7th Cir. 1940); *Little* v. *United States,* 73 F. 2d 861, 866 (10th Cir. 1934).

Analysis of the relevant developments at the trial, recounted *supra,* reveals that fully two-thirds of all the evidence developed by the prosecution related to Count One of the indictment. Such voluminous evidence was improper and prejudicial and should never have been before the jury.

Apart from the overwhelming volume of prejudicial evidence before the jury on Count One, the trial court in its *supplemental* instructions charged the jury as follows *with respect to the prejudicial matter:*

> "Count 1 is the count where he is charged, and there is evidence, in fact, through his attorney, for practical purposes, *he has admitted that there is a considerable amount of taxes due the United States; that he didn't report his taxes correctly, and that he failed to state his income, understated his income, for quite a substantial amount of money, and I am referring, mainly, to the income received from the sale of subdivision lots and condemnation proceedings. . . .*" (R-Vol. IX, 11-12). (Emphasis added).

Bearing in mind that the petitioner Wilkins had made no such admission as attributed to him and had pleaded "not guilty", the foregoing instruction approached, if indeed it was not in fact, a directed verdict of guilty—

predicated upon a mass of evidence which should never have been before the jury. As stated by the court in *Hardy* v. *United States,* 335 F. 2d 288, 290 (D. C. Cir. 1964):

> "... The trial judge effectively removed the factual issues from the free choice of jury decision which trial by jury requires. The judge stated as facts, rather than as testimony to be considered by the jury in deciding the facts, the whole case of the prosecution."

Based upon the improper and prejudicial evidence on Count One, taken with the trial court's gravely erroneous charge, the jury convicted Wilkins on Count One. To say that this may not have prejudiced the jury in its consideration of the remaining counts of the case is to ignore human experience. Such prejudice cannot be compartmentalized and confined to Count One alone, as the Fourth Circuit has done, simply because there may have been sufficient evidence to sustain the convictions on the remaining counts. Prejudice is not so neatly contained! Nor may the sufficiency of evidence on other counts defeat a solid claim of prejudice.

In fact, the Fourth Circuit has so recognized in *United States* v. *Johnson,* 337 F. 2d 180 (4th Cir. 1964), aff'd. 383 U.S. 169 (1966):

> *"Though we find the evidence sufficient to support a guilty verdict on all counts, the invalidity of count one as applied to Johnson was obviously prejudicial to his right to the unbiased consideration of the jury on the remaining counts.* Many of the events testified to at the trial related only to the speech. It was introduced into evidence and its authorship, contents, motivations and accuracy made the subject of extensive inquiry. *The conclusion is unavoidable that this mass of evidence*

> *and comment, all inadmissible against Johnson, infected the jury's consideration of his innocence or guilt under the conflict of interest counts.* The judgment against Johnson is therefore vacated and the case remanded for a new trial on the counts charging violations of 18 U.S.C.A. § 281." 337 F. 2d at 204. (Emphasis added).

Significantly, the court computed that some one-half of the evidence adduced at trial in *Johnson* was inadmissible; in the instant case some two-thirds of the trial evidence adduced against Wilkins was inadmissible.

In contemplation of the disparity in the Fourth Circuit decisions in *Johnson* and *Wilkins,* the holding in *Flemister* v. *United States,* 260 F. 2d 513 (5th Cir. 1958), is illuminating. In *Flemister* the defendant had been convicted of willfully and knowingly attempting to evade and defeat his income taxes in the years 1949, 1950, and 1951. The Fifth Circuit held, among other things, that the trial court erred in not granting defendant's motion for an acquittal on Count One on the ground that the year 1949 was barred by the statute of limitations. The court thereupon ordered a new trial on the remaining counts, stating:

> "Where, by a trial of the limitation issue separately it should have been determined, as we have done, that the year 1949 was barred, it might well have been prejudicial to the defendant for the jury to hear evidence of understatements of income and computations of underpayment of tax as to the barred year in addition to those which were properly before it." 260 F. 2d 518.

How much more is a comparable result impelled by the facts of the instant case where the overwhelming

majority of the evidence in the entire case was improperly received under Count One and where the trial court effectively instructed that such improper evidence established the defendant's guilt! Could any jury, having erroneously convicted the defendant on Count One, thereafter be dispassionate and impartial in its consideration of evidence related to the remaining counts?[5]

In *Smith* v. *United States,* 335 F. 2d 270 (D.C. Cir. 1964), the court observed as follows in a case wherein the evidence received under one count was found to be inadmissible:

> "The Government argues that (since the sentences on all counts are concurrent) under Hirabayashi v. United States, 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943), we may affirm the entire judgment, despite error on count one, if there is sufficiently properly admitted evidence to sustain the jury's verdict on count two or count three. But we think *Hirabayashi* allows affirmance only if the jury's consideration of counts two and three was not prejudiced by error on count one. This appears from the rule as stated by the Supreme Court in United States v. Trenton Potteries Co., 273 U.S. 392, 402, 47 S. Ct. 377, 381, 71 L. Ed. 700 (1927) . . ."

In the context of treating the question whether, in a case involving concurrent sentences, a conviction on one count may stand in the face of reversal on another count, the court in *Smith, supra,* stated:

> "*. . . we are aware of no case which invoked the rule to defeat a claim of prejudice resulting from*

[5] Significantly, the trial court suggested to the jury that it "take up Count One first and dispose of that Count, get your final vote, your final unanimous vote, before you consider the other one." (R-Vol. VIII, 173-174).

> *the seriously erroneous admission of evidence.* Most often the error alleged is insufficiency of the evidence, Lawn v. United States, 355 U.S. 339, 359, 78 S. Ct. 311, 2 L. Ed. 2d 321 (1958), or invalidity of the law, Whitfield v. Ohio, 297 U.S. 431, 56 S. Ct. 532, 80 L. Ed. 778 (1936). In neither type case would prejudice from the invalid count be likely." Footnote 2, 335 F. 2d at p. 272.

Similarly, we have found no case wherein extensive prejudicial evidence and instructions on one count has not served to vitiate a conviction on another count, thereby requiring a new trial on all counts. It is submitted that the Fourth Circuit holding in *Wilkins* represents a dangerous extension, destructive of a defendant's Sixth Amendment right to trial before an impartial jury, of the sufficiency-of-the-evidence concept to a case involving a claim of prejudice flowing from the seriously erroneous admission of voluminous evidence and improper instructions thereon. The issue is one of prejudice, not sufficiency of evidence, as clearly recognized in *Fahy* v. *Connecticut*, 375 U.S. 85:

> "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a *reasonable possibility that the evidence complained of might have contributed to the conviction.*" 375 U.S. at pp. 86-87. (Emphasis added).

At the expense of repetition, *the question here presented is not the adequacy of evidence to convict on the remaining counts but whether within the range of reasonable possibility the voluminous prejudicial evidence and instructions may have contributed to the conviction. Kotteakos* v. *United States*, 328 U.S. 750 (1946); *San Fratello* v. *United States*, 340 F. 2d 560 (5th Cir.

1965), rehearing denied 343 F. 2d 711; *Oliver* v. *United States,* 335 F. 2d 724, 728 (D.C. Cir. 1964); cert. denied sub nom. *Crump* v. *United States,* 379 U.S. 980 (1965).

The prejudice to Wilkins under Counts Two, Three, and Four as a result of the presentation of inadmissible evidence under Count One is not unlike the prejudice to the defendants in *Kotteakos* v. *United States, supra,* which resulted from the joinder in one trial of charges against a number of unrelated defendants. The Supreme Court said:

> ". . . the question is, not were they [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. (Citations omitted).
>
> "This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. . . .
>
> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. (Citation omitted). *But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result;*

apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S. at 764-765, 66 S. Ct. at 1247-1248. [Emphasis supplied].

In assessing whether the prejudicial effect of the improper evidence received under Count One may have prejudiced the jury in its independent consideration of the remaining counts, it is germane to note the fundamental relative *weakness* of the Government's evidence on such remaining counts. The relative strength of the evidence against the defendant is a material factor in weighing whether trial errors require reversal. *Jones* v. *United States,* 338 F. 2d 553, 554, n. 3 (D.C. Cir. 1964).

The sole ultimate issue common to Counts Two, Three, and Four of the Wilkins indictment was whether he had an agreement with the lessee of his property that payments received for the first three years (covering the three counts) of the lease period were for the purchase of Wilkins' home located on the property and hence not taxable income. As found by the Court of Appeals, three witnesses who participated in the negotiations for the property testified as to the existence of such an agreement. Two other witnesses gave corroborating testimony;[6] and documentary evidence concerning the agreement was presented.[7] In an ultimate sense, the only probative evidence countering this preponderant evidence was a written confirmatory agreement prepared by Wilkins, and signed by the lessee,

[6] Defendant's Exhibit No. 10; R-Vol. VIII, 55-57.

[7] Defendant's Exhibit No. 2; R-Vol. VI, 30.

long after the tax returns had been filed. The confirmatory agreement was predated, however, as of the date of the original transaction and was permitted to serve as basis for an inference by the jury that the confirmatory agreement was therefore fabricated. The overwhelming weight of the evidence thus supported the defense on Counts Two, Three, and Four. Can it be reasonably said that a jury, charged with finding guilt beyond a reasonable doubt, would have rejected the overwhelming weight of the evidence concerning the existence of an agreement to purchase the Wilkins' home if not influenced by its finding that Wilkins—on the basis of inadmissible evidence and grossly improper instructions—had sought to evade taxes under Count One? It is significant that the court in *Smith* v. *United States, supra,* observed that improper evidence received under one count could only be deemed "harmless" where the prosecutive evidence on the remaining counts was "overwhelming". Here, however, the contrary exists.

Wilkins in his pre-trial motions moved to dismiss Count One on the very ground on which this Court has reversed his conviction thereon, and also moved to have that evidence excluded from the trial, but the trial court ruled against him. In addition, Wilkins moved for a severance of Count One on the ground that the pre-1960 evidence would be prejudicial to him on the other counts, but this motion was also denied. The Fourth Circuit has in effect ruled that the trial court was in error in denying the defense motions to exclude this evidence from the trial. Had the trial judge himself reached that conclusion prior to submitting the case to the jury the amount of inadmissible evidence already introduced would almost certainly have com-

pelled him to declare a mistrial. At the very least the situation would have required the trial judge to give strong and definite instructions to the jury to disregard this evidence. As the court in *United States* v. *Simone*, 205 F. 2d 480, 483 (2d Cir. 1953), stated:

> "It is the general rule that error in admitting evidence may be cured by instructing the jury to disregard it; but where the character of the evidence is such that the jurymen are unlikely to be able to blot it from their minds despite the court's later instruction to do so, a mistrial should be granted."

Here there were no instructions to disregard the improper evidence. Indeed, the instructions with regard to Count One were such as to prejudice Wilkins on all counts, as discussed above. If it is impossible for a jury to eradicate substantial prejudicial evidence from its thinking when it has been instructed to do so, how can the Court say that here, where the jury was not so instructed, it was uninfluenced by the inadmissible evidence in reaching its verdict on Counts Two, Three, and Four? Is not the necessity for a new trial upon the whole of the case even more pronounced upon appellate review where the jury has convicted a defendant as a tax evader upon the prejudicial evidence and instructions and thereupon proceeds to consider evidence as to other counts?

Where voluminous prejudicial evidence, aggravated by seriously erroneous instructions, goes before a jury, as here, a new trial is required for the elementary reason that the court cannot be certain what influenced the minds of the jurors in reaching a verdict. Otherwise expressed in another connection, the court in

Braswell v. *United States,* 200 F. 2d 597, 602 (5th Cir. 1952), stated:

> "The right to trial by jury comprehends a fair determination of the guilt or innocence of the accused, free from bias, passion or prejudice. See United States v. Haupt, 7 Cir., 136 F. 2d 661. And where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. See Little v. United States, 10 Cir., 73 F. 2d 861, 866, 96 A.L.R. 889; Cf. Kotteakos v. United States, 328 U.S. 750, 763-765, 66 S. Ct. 1239, 90 L. Ed. 1557."

The Supreme Court is urged to review the instant case to forestall a dangerous precedent tending inexorably to undermine a defendant's right under the Sixth Amendment to be tried before an impartial jury.

CONCLUSION

For the reasons hereinbefore stated, this petition should be granted in contemplation of conflicting decisions among courts of appeals to the end that uniform standards shall obtain in Federal criminal cases upon fundamental questions related to specific intent, burden of proof, and the impact of extensive prejudicial evidence upon a defendant's right under the Sixth Amendment to be tried before an impartial jury.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,844

UNITED STATES OF AMERICA, *Appellee,*

v.

DONALD L. WILKINS, *Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
OREN R. LEWIS, DISTRICT JUDGE.

(Argued February 9, 1967. Decided October 31, 1967.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF and BOREMAN, Circuit Judges.

Edward P. Morgan (Edward S. O'Neill and Marvin S. Romanoff; and Welch & Morgan on brief) for Appellant, and John D. Schmidtlein, Assistant United States Attorney, (C. V. Spratley, Jr., United States Attorney, Roger T. Williams, Assistant United States Attorney, and Burton Berkley, Attorney, Department of Justice, on brief) for Appellee.

BOREMAN, Circuit Judge:

Defendant, Donald L. Wilkins, was convicted by a jury on all four counts of an indictment returned on December 8, 1965, charging him with willfully attempting to evade

the payment of income taxes for the years 1960, 1961, 1962, and 1963, in violation of 26 U.S.C. § 7201. Motions for judgment of acquittal notwithstanding the verdict and, in the alternative, for a new trial, were denied. On appeal the defendant urges, as ground for reversal that, as to Count One, involving the year 1960, the court improperly determined that income received in years prior to 1960 could be attributed to 1960; that, as to the other three counts, the evidence was insufficient to sustain convictions; and that certain instructions to the jury, to which no objections were interposed, constituted plain error which should be noticed by this court under Rule 52(b), Fed.R.Crim.P.

We consider first the conviction on Count One apart from the other counts.

COUNT ONE (YEAR 1960)

The Government contended at trial that Wilkins understated his income for the year 1960 in the amount of $28,627.74, the greater portion of which was derived from the sale of real estate. On February 26, 1958, Mr. and Mrs. Wilkins entered into an agreement with Phoenix Construction Company (hereafter Phoenix) to sell to Phoenix twenty-five lots which they had subdivided from their 32-acre tract known as Munson Hill Farm. Phoenix agreed to pay a total sum of $112,500.00 ($4,500.00 for each lot), $20,000.00 in cash at the date of settlement and the balance to be evidenced by a note for $92,500.00 to be secured by a purchase money deed of trust. Wilkins agreed to assume responsibility, at his cost and expense, for the installation of streets, sidewalks, water mains, sewerage and utilities. The contract also permitted Phoenix, at its option, to acquire four additional lots at $4,500.00 each.

On October 2, 1958, settlement was completed. Wilkins received the purchaser's deed of trust note for $92,500.00 and netted from the cash payment the sum of $14,236.25 after deduction of commissions, attorney fees and other

costs and expenses. Subsequently, Phoenix exercised its option and on September 18, 1959, settlement was made for the sale of four additional lots, at which time Wilkins received a note for $14,800.00, secured by deed of trust, and a cash payment of $2,229.70.

The note in the amount of $92,500.00 was pledged by Mr. and Mrs. Wilkins to the Mount Vernon Trust and Deposit Company as collateral security for loans to them totalling $90,000.00, evidenced by their five separate notes. The proceeds from the $92,500.00 note were assigned to the bank. The procedure employed in connection with the sale of the twenty-five lots and the payment therefor was as follows: Phoenix would notify the settlement attorneys who would prepare an itemized statement of charges then owing whereupon Phoenix would transmit payment to the settlement attorneys who would forward such payment to the bank. The bank credited these payments as received to reduce the amount of the Wilkins loan. Mr. Wilkins was notified of each curtailment by means of a credit memorandum sent to him by the bank. It was from these credit memoranda that Wilkins determined, for income tax purposes, how much he received from the lot sales. Payments from the sale of these lots were received in the years 1958 and 1959, as well as 1960, when Wilkins received the last payment; however, the exact amount received in each year is in dispute. In 1960 Wilkins completed performance of his obligations under the agreement. To his 1959 income tax return Wilkins had appended a note stating he was awaiting the termination of what he believed to be "a continuing transaction" before he reported the final capital gain which he estimated would be about $20,000.00 with a resulting tax of $2,500.00.

In a joint return for 1960, Wilkins purported to report the income received from the sale of all the lots of the Munson Hill Farm. He reported total receipts from the sale of this property as $86,763.19. He claimed expenditures with

respect to improvements of the property in the amount of $80,256.24, and a capital gain of $6,506.95. The Government claimed that Wilkins received $125,779.84 as income from these sale transactions and, after allowing him various expenses as deductions, determined that he understated his *gain* by more than $39,000.00. To prove these understatements, the Government offered the testimony of Mount Vernon's bank teller, check stubs and the credit memoranda sent to Wilkins. No challenge is made to the sufficiency of this evidence.

In addition, the Government contended that Wilkins failed to fully report other income, and that he took improper deductions. These matters are summarized briefly. In 1956 Wilkins had received $15,568.50 as an award for a certain other tract of land which had been taken by condemnation. In reporting this income in 1960, Wilkins claimed over $10,000.00 in deductions for installation of a street and the discharge of an indebtedness secured by a mortgage. At trial, evidence was produced to show that over $7,000.00 of these expenses were fictitious and that the gain was over $12,000.00. Evidence was also introduced to prove that Wilkins understated by more than $2,000.00 the amount of interest received by him in 1960 and that he failed to report $620.00 received in the same year by Mrs. Wilkins from another source. It was also shown that he overstated interest paid by him in 1960 by about $200.00 and overstated depreciation of his automobile in 1960 by about $887.00. These contentions were proved by the testimony of bank representatives, statements from Wilkins' own deposition and by the return itself. The accuracy of this proof is not questioned.

The indictment was returned in December 1965. The defendant attacks the conviction for the year 1960 on the ground that no income tax was owing by him in that year for the income which he had received in the years 1956, 1958, and 1959. It is argued that in the absence of fraud on the

part of Wilkins the six-year statute of limitations had barred prosecutions for the years 1956 and 1958. 26 U.S.C. § 6531.

The Government counters with the argument which underlay its theory at trial, that since Wilkins elected to report this income in his 1960 return, even going so far as to append a note to this effect on his 1959 return, he was bound by this election. The Government points out that there is no question here of civil liability; that Wilkins is charged in the indictment with an attempt to evade taxes and that when he filed his return in 1960 if he was attempting to avoid what he felt were taxes due for that year a jury could find him guilty of violating 26 U.S.C. § 7201 irrespective of any civil liability.

The statute which serves as the basis of the indictment, 26 U.S.C. § 7201, simply provides "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony * * *." However, the pronouncements of the courts make it clear that an essential element of the offense of attempting to evade taxes due in any given year is the existence of a deficiency for that year although the statute does not specifically so provide. *Sansone* v. *United States,* 380 U.S. 343, 351 (1965); *Lawn* v. *United States,* 355 U.S. 339, 361 (1958); *Sherwin* v. *United States,* 320 F. 2d 137, 149 (9 Cir. 1963); 10 Mertens, Law of Federal Income Taxation, § 55A.06 (1964 Rev.).

In support of its argument the Government relies heavily on this court's decision in *Morrison* v. *United States,* 270 F. 2d 1 (4 Cir.), *cert. denied,* 361 U.S. 894 (1959). That was an appeal from a conviction on a charge of attempting to evade and defeat income taxes. The taxpayer had employed what was conceded by the Government to have been an improper method of accounting. However, this court held that if a taxpayer makes such an improper election he

is bound by it and cannot complain when the Government employs the same method at trial to prove a violation of the law. The Government argues that *Morrison* is apposite in the instant case because Wilkins treated income received in earlier years as received in 1960, the year of indictment, and then failed to report all of it.

Wilkins' theory in treating the income from the sale of the lots as received in 1960 was that he could not determine his costs for the installation of streets and sidewalks, mains, sewerage and utilities until he completed these agreed undertakings. In the note appended to his 1959 return he referred to the contract as "a continuing transaction." Section 451-3(b) of the Internal Revenue Regulations permits a taxpayer who had entered into a long-term contract to report income derived therefrom in the taxable year in which the contract is finally completed and accepted. By section 451-3(a), long-term contracts are defined as "building, installation, or construction contracts covering a period in excess of one year from the date of execution of the contract to the date on which the contract is finally completed and accepted."

The Government urges that since Wilkins had to make installations involving expenditures pursuant to the contract he made a proper election under section 1.451-3 of the regulations. However, *Wood* v. *C.I.R.*, 245 F. 2d 888 (5 Cir. 1957), *a civil case,* clearly states that contracts "for the sale of real estate are in no sense building, installation or construction contracts * * *." *Id.* at 892. In *Wood* the taxpayers, residents of Texas, sold real estate by mail and agreed to construct roads and streets. Taxpayers used the completed contract method in reporting the income from such transactions. They did not report income from the sale of a tract until the final payment was received and then deducted as business expenses the amounts paid by them for the construction of the streets and roads. It was held that the taxpayers could not avail themselves of the long-term

contract provision of the Regulations. See generally 2 Mertens, Law of Federal Income Taxation, § 12.132.

In addition to *Wood*, it is clearly indicated in a series of civil cases that while the Commissioner of Internal Revenue has discretion to make computations and adjustments in order to clearly reflect income he is not empowered to add to a taxpayer's gross income for a given year an item which should have been reported in an earlier year. The taxpayer's mistaken omission from income of an amount properly includible in his income for a given year does not nullify the statute of limitations on assessment and collection of income taxes. See *Commissioner* v. *Frame*, 195 F. 2d 166 (3 Cir. 1952); *Commissioner* v. *Mnookin's Estate*, 184 F. 2d 89 (8 Cir. 1950); *Clifton Manufacturing Co.* v. *Commissioner*, 137 F. 2d 290 (4 Cir. 1943).

In *Commissioner* v. *Frame, supra*, a taxpayer who kept his books on the accrual basis had filed his income tax returns for the years 1942-1945 on the cash basis in violation of the Internal Revenue Code. In 1945, the Commissioner, after examining the return for that year, adjusted taxpayer's income for that year to the accrual basis as reflected in his books and added a sum representing accounts receivable appearing on the books as of December 31, 1944. The Commissioner explained that his adjustment was made to take into consideration items of income not reflected in the return for the prior year (1944). The Tax Court held that the Commissioner erred in adding sums for accounts receivable in 1944 to gross income in 1945. The Third Circuit affirmed, holding that "the accounts receivable in question were income of the taxpayer for the years prior to 1945 and were not taxable to him in the latter year even though he had erroneously failed to report them in his returns for the prior years." 195 F. 2d 166.

This principle applies to the instant case. While Wilkins had mistakenly failed to report income from the sale of the Munson Hill tract in the years in which he received it these

amounts were not taxable to him in the prosecution year, 1960.

The Government argues that the gravamen of an indictment for violation of section 7201 is an *attempt* to evade or defeat tax obligations and that it is necessary to follow the taxpayer's method in order to demonstrate what he was attempting to do. It relies upon *Morrison* v. *United States, supra,* 270 F. 2d 1, and subsequent cases which apparently undertake to apply *Morrison* principles. However, in *Morrison* evidence tending to show unpaid taxes in years prior to the prosecution years was admitted, not to prove a tax deficiency in the prosecution years, but to show a pattern of dishonesty and false reporting of income in order to prove willfulness. In arriving at these figures for the earlier years the prosecution, in *Morrison,* followed defendant's peculiar method of accounting. While this court permitted the Government to use defendant's accounting method, which was admittedly an improper method, it clearly indicated the purpose of such evidence. Referring to this evidence the court said,

> "It is quite true that such a computation would not be admissible if inquiry here was directed simply to the tax obligations of the taxpayer. In this criminal proceeding it was necessary to establish not only that the tax liabilities here were understated, but that the understatement was attributable, at least in part, to the fact that the taxpayer's returns were not honestly prepared. Proof of the latter fact could only be accomplished by adopting and consistently applying the taxpayer's own method of accounting, despite the fact that we are all agreed that the method, itself, is improper, or less reliable than some other method." 270 F. 2d 3-4.

If *Morrison* is apposite here it appears to support defendant's position that evidence of unpaid taxes in years prior to the prosecution years is not admissible to prove a

deficiency for the prosecution years. Reliance on cases involving the net worth theory of prosecution subsequent to *Morrison* is also misplaced. This is not a "net worth" case. Wilkins is being prosecuted on Count One for understating his taxable income for the year 1960. While we have found no criminal case directly in point, there are several cases which are helpful because of the analogous legal and factual setting.

In *Koontz* v. *United States*, 277 F. 2d 53 (5 Cir. 1960), defendant was tried on a one-count indictment under section 7201's predecessor. The gist of the indictment was that defendant had claimed a $1200 exemption for his wife who was deceased. By way of defense, counsel attempted to show first a technical error and second that there was no deficiency owing to the government because defendant had taken a capital loss for an item which was a loss of ordinary income and that this was greater than the $1200 defendant had claimed as an exemption. At trial, the defense summarized its theory as follows:

> "'* * * the fact that the return is mistakenly filled out, even willfully or knowingly, alone does not constitute the offense. There must be some loss of revenue to the Government in order to constitute the offense.'" 277 F. 2d at 54.

The District Court refused to permit the presentation of this theory of defense and instructed the jury that the only issue in the case was whether defendant had willfully claimed his deceased wife as an exemption. As to defendant's tendered issue the court took the view that this was a matter to be litigated on the civil side. The Fifth Circuit granted a new trial, holding that the law was as defendant contended and that he was entitled to have a jury trial on the issue tendered by him. 277 F. 2d 55. The principle that a defendant in a tax evasion case is entitled to show that no money was owing to the government in the prosecu-

tion year has been widely accepted. *Willingham* v. *United States*, 289 F. 2d 283, 285-86 (5 Cir.), *cert. denied*, 368 U.S. 828 (1961); *Jones* v. *United States*, 282 F. 2d 745, 747 (4 Cir. 1960), *cert. denied*, 365 U.S. 842 (1961); *McClanahan* v. *United States*, 272 F. 2d 663 (5 Cir. 1959); *Elwert* v. *United States*, 231 F. 2d 928 (9 Cir. 1956); *United States* v. *Bender*, 218 F. 2d 869, 871 (7 Cir.), *cert. denied*, 349 U.S. 920 (1955); *Clark* v. *United States*, 211 F. 2d 100, 103 (8 Cir. 1954), *cert. denied*, 348 U.S. 911 (1955).

We think this principle applicable to the case at bar. Even assuming that Wilkins had filed his 1960 tax return with the intent to evade his tax obligations, he was entitled at trial, upon a showing that there was no obligation to report income from the earlier Munson Hill transactions in his 1960 return, to have evidence of his understatements excluded. The court below erred in permitting Count One to go to the jury on the Government's theory. This error was compounded by the court in its charge to the jury, a portion of which is set out in the margin.[1]

The Government argues that there is ample evidence, independent of the pre-1960 transactions, to show that Wil-

---

[1] The jury was instructed as follows:

> "So that there will be no misunderstanding on your part, Mr. Wilkins is bound by the method he elected to file his return. He is bound and the government is bound to follow the method in his criminal case that Mr. Wilkins elected to use in filing his 1960 return. He will not be heard, should not be heard in saying, 'Well, I don't owe any tax because, had I filed it in 1956'—I am talking about the condemnation part—'or had I used an installment basis, or some other basis, I wouldn't owe all this.' He elected to treat the subdivision and the condemnation and the whole thing as a completed transaction in 1960. He said the whole thing was completed, and he reported it to the government accordingly, and he figured it on a completed basis."

kins made false statements concerning income unquestionably received in 1960 and included in the 1960 return. Primarily, however, the Government's case on Count One was devoted to Wilkins' failure to report income actually derived from transactions which occurred prior to 1960, income which was not attributable to 1960. Evidence was introduced by the prosecution to show that Wilkins understated his 1960 taxable income by more than $28,000.00, when not more than approximately $4,000.00 of that amount was attributable to the prosecution year 1960. Defendant argues that the introduction of so much improper evidence, the permitted comments thereon and consideration thereof gravely prejudiced the jury against him. We find sufficient merit in this argument from which to conclude that the conviction of the defendant on Count One should be set aside and a new trial on that count should be awarded. It will be so ordered.

Counts Two, Three and Four
(Years 1961, 1962, 1963)

The second, third and fourth counts of the indictment allege that in the years 1961 through 1963 Wilkins received, as income, rentals (ground rents) from property which he and his wife had leased to a corporation, United Properties, and that such income was not reported in the returns for those years. On June 17, 1961, Wilkins and his wife entered into an agreement by the terms of which they leased twelve and one-half acres of the Munson Hill tract to United Properties for 99 years for a total rental of $2,213,820.00. The lease was formally executed on August 10, 1961. Wilkins received the following amounts from United Properties: $22,590.00 in 1961, $22,590.00 in 1962, and $18,072.00 in 1963. These amounts, shown on the books and records of United Properties to have been payments of rentals, were not reported in the taxpayer's returns for those years.

Wilkins contended that these receipts were, in reality, payments toward the agreed purchase of Wilkins' house which stood on the leased tract. He claimed that since he planned to expend this money for another dwelling house, such payments were nontaxable. He further contended that, as a condition precedent to entering into the lease, there was a binding agreement that United Properties would purchase the Wilkins house. The formal lease between United Properties and the defendant made no reference to any such agreement. According to the lease the total sum due thereunder was the aggregate of the rentals for a period of 99 years. During the pre-indictment investigation conducted by agents of the I.R.S., Wilkins told Agent Hutnick that he had searched his files for a copy of the purchase agreement and could not find it but that he would attempt to secure a copy from Mr. Meltzer, president of United. Subsequently, Wilkins submitted to Hutnick a letter purporting to show that there was such an agreement signed by Wilkins and Meltzer. The letter was represented as having been written on August 15, 1961, the date shown thereon. At trial Mrs. Wilkins testified to such an agreement as did J. Fuller Groom and Joseph Miller, real estate agents. Mr. Meltzer was deceased at the time of trial and no testimony was introduced to explain the circumstances under which his signature on the letter was obtained.

The Government produced the letter dated August 15, 1961, but presented as witnesses a document-examiner and the secretary who prepared the letter to prove that the letter was not written on August 15, 1961, but was actually prepared sometime in January or February 1964. Confronted with this evidence, the defense then stipulated that the letter was actually written in 1964. The Government's theory was to show defendant's guilty state of mind by proving that he had the letter drawn up after he was under investigation by the I.R.S. and had it dated in 1961 in order

to show that a contract of purchase did, in fact, exist at that time.

The only issue with respect to these 1961-1963 counts is whether there was sufficient evidence from which the jury could properly conclude that Wilkins willfully attempted to defeat and evade his income tax obligations. The elements of the section 7201 offense are willfulness, a tax deficiency and some affirmative act constituting an attempted evasion of the tax. *Sansone* v. *United States, supra,* 380 U.S. at 351; *Lawn* v. *United States, supra,* 355 U.S. at 361; *United States* v. *Beacon Brass Co.,* 344 U.S. 43, 46 (1952). See also *Spies* v. *United States,* 317 U.S. 492, 498-99 (1943).

In this case it was necessary that the Government show that income taxes were owing and that Wilkins willfully attempted to defeat or evade them. To prove that there was a tax deficiency it was necessary to establish that Wilkins received income which he did not report in his return for those years. The Government undertook to establish this by introducing the lease agreement providing for the payment of *rentals* during the term of 99 years, evidence that Wilkins had received rentals during the years in question and by showing that such receipts were not reported as income in his returns for those years. Wilkins then attempted to defend on the theory that these payments were not rental receipts but were payments for the sale of his house which he intended to reinvest in a new home as permitted under the Internal Revenue Code. He attempted to show a contract of sale and purchase of the Wilkins home located on the leased premises and introduced the testimony of Mrs. Wilkins, J. Fuller Groom, Joseph Miller and his own deposition. In finding Wilkins guilty the jury apparently rejected the testimony offered by his witnesses and accepted the contention of the Government that the defendant's story as to the sale of the home was pure fabrication.

As proof of Wilkins' willfulness the Government introduced evidence to show that he prepared a letter in 1964

purporting to confirm the asserted existence of a contract of sale and that he attempted to make it appear that the letter was written in August 1961. If this were true the jury could infer that Wilkins fabricated evidence to support his explanation to the I.R.S. of his failure to report income. Subsequent acts of a defendant, such as the fabrication of evidence or false explanations which will aid his defense, are clearly admissible to prove his guilty state of mind. *Wilson* v. *United States,* 162 U.S. 613, 620-21 (1896); *Corey* v. *United States,* 305 F. 2d 232, 238 (9 Cir. 1962); *Rizzo* v. *United States,* 304 F. 2d 810, 830 (8 Cir. 1962); *United States* v. *Simone,* 205 F. 2d 480, 483 (2 Cir. 1953); 2 Wigmore on Evidence, § 278 (3d ed. 1940).

The jury was entirely free to accept or reject such evidence. Indeed the evidence that in 1964 Wilkins had prepared and presented to I.R.S., after he was under investigation, a letter purporting to have been written in 1961 probably weighed heavily in the minds of the jurors. We cannot say that the inference of guilt was an unreasonable one and not supported by the evidence. Judge Frank, in dealing with the same problem, aptly stated:

> "Defendant's story may have been true; * * *. But the undoubtedly grave problem of providing adequate safeguards against convictions of the innocent must be solved in some way other than that of refusing to allow reasonable inferences to be made." *United States* v. *Allen,* 159 F. 2d 594, 598 (2 Cir. 1946).

Instructions

Defendant also complains that portions of the court's charge to the jury were prejudicial. Although no objections were made at that time as required by Rule 30, Fed. R. Crim.P., defendant asks this court to notice certain instructions as plain error and as affecting his substantial rights under Rule 52(b), Fed.R.Crim.P.

The first of these instructions, set out in the margin,[2] deals with intent and was subsequently repeated to the jury, at its request, after deliberations had commenced. Defendant contends that the second sentence of this instruction, beginning with the words "so, unless the evidence in this case * * *" tended to shift the burden of proof to defendant to come forward with evidence that he did not intend the natural and probable consequences of his acts. In addition, defendant asserts that an essential element of a violation of 26 U.S.C. § 7201 is specific intent but the instruction deals with the average person rather than the particular defendant, Wilkins. Defendant cites *Mann* v. *United States*, 319 F. 2d 404 (5 Cir. 1963), *cert. denied*, 375 U.S. 986 (1964), as supporting his contentions. It is true that in *Mann* this identical instruction was held to constitute reversible error even though no exception was made at trial. The court reasoned that

> "If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results." *Id.* at 409.

However, a substantially similar instruction is favorably regarded by the writer of a manual of instructions employed

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[2] "As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences, which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

by many federal judges.[3] Such an instruction has been recently approved by the Ninth Circuit in *Sherwin* v. *United States, supra,* 320 F. 2d at 148-51. This charge, even when repeated, was general in nature and did not deal specifically with violations of section 7201. *Compare Sherwin* v. *United States, supra,* with *Bloch* v. *United States,* 221 F. 2d 786, 788 (9 Cir. 1955).

This instruction was one in a series of instructions dealing with willfulness and specific intent. It seems highly improbable that the jury would pick out and focus its attention on one particular clause and abstract the notion that the defendant had the burden of proof to introduce evidence to prove he did not intend the natural and probable consequences of his acts. Furthermore, the court clearly emphasized that the Government had the burden of proving each and every element of the offenses charged beyond a reasonable doubt. To this effect the court stated "the law never imposes upon a defendant in a criminal case the burden or duty of producing *any evidence* * * *. Now as I told you, *there is no duty on the defendant to produce any evidence.*" (Emphasis supplied.) Even when this instruction was repeated it was one in a series. Again the jury was instructed that it was the Government's duty to prove its case beyond a reasonable doubt. *Legatos* v. *United States,* 222 F. 2d 678 (9 Cir. 1955).

We also feel that the court properly instructed the jury as to willfulness and specific intent. The defense theory was that Wilkins was ignorant of his tax responsibilities. It is difficult for this court to see how an instruction such as "the defendant's acts in connection with his income tax are not wilful if they are done through inadvertence, carelessness, or honest misunderstanding of what the law requires," could possibly leave any doubt that, in order to convict, the jury must find that Wilkins specifically intended to evade or defeat his tax obligations. When a charge as a whole fairly calls to the attention of the jury the necessity of proof of

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[3] Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 78 (1961).

willfulness in an income tax evasion case, an isolated part of a charge that a person is presumed to intend the natural consequences of his acts does not constitute prejudicial error. *Legatos* v. *United States, supra; Windisch* v. *United States,* 295 F. 2d 531 (5 Cir. 1961). *But cf. Mann* v. *United States, supra,* 319 F. 2d at 410. We are not inclined to reverse the convictions in the instant case because of asserted errors in instructions, particularly since no objection was interposed at trial and the court below had no opportunity to clarify the charge or to omit therefrom any portion thereof which, standing alone, the defendant might deem unfair and objectionable.

Finally, defendant contends that two instructions by the court suggested that in order to find Wilkins innocent it was necessary for the jury to conclude that he was either a fool or abysmally ignorant. These instructions are set out in the margin.[4] Wilkins asserts that it was improper to suggest this conclusion as an alternative to guilt. We find this argument totally lacking in merit. The defendant would have had the jury conclude that defendant, an educated man,[5] was in reality stupid when it came to income tax

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[4] "Now it is up to you to determine * * * whether he did it wilfully and intentionally or whether he did it as a result of abysmal ignorance. * * *."

"* * *, if any doubt about it in your mind that it was wilful and deliberate, that it was only done by absymal ignorance and the rankest kind of stupidity, * * * you should find him not guilty."

[5] The Government calls attention to certain background facts: Mr. Wilkins was well educated; he obtained an A.B. degree in 1931; he was graduated from law school in 1935 and received a Master's degree in 1938; he had worked for a short time as a legal editor for Prentice-Hall Tax Service and was an attorney and corporate planning consultant in Washington, D.C.; Mrs. Wilkins, herself a law graduate, was not indicted since the joint returns for the years in question were prepared exclusively by her husband; she was a member of the Fairfax County Board of Supervisors from 1952 to 1963 as well as the Fairfax County Planning Commission; Mr. Wilkins was a subscriber to published tax services and tax guides.

matters. Defendant's trial counsel in his opening argument and in his summation used the words "stupid" and "educated fool" in his attempt to persuade the jury to acquit his client. The court in giving these instructions, far from prejudicing Wilkins, charged the jury in keeping with Wilkins' theory of defense.

Defendant contends that the court's error as to the admission of evidence with respect to the offense charged in Count One was so great as to prejudice the jury in its consideration of the remaining counts. However, in view of the fact that there was substantial independent evidence to support the defendant's convictions on Counts Two, Three and Four, we think the taint attaching to the presentation of Count One was not so great as to permeate or materially affect the convictions on the remaining counts.

Defendant's conviction and sentence on Count One are set aside and the defendant is awarded a new trial on that count. The convictions and sentences on Counts Two, Three and Four are affirmed.

Reversed as to Count One;
Affirmed as to Counts Two,
Three and Four.

APPENDIX B(1)

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA

No. 4297

UNITED STATES OF AMERICA
v.
DONALD L. WILKINS

On this 8th day of August, 1966 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Income tax evasion (violation of Title 26, Section 7201, USC) as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18), twelve months (12) suspended as to each of Counts 1, 2, 3, and 4. Sentences imposed herein as to Counts 2, 3, and 4 shall run concurrently with sentence imposed as to Count 1.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

OREN R. LEWIS
United States District Judge

The Court recommends commitment to:

W. FARLEY POWERS, JR.,
Clerk.

APPENDIX B(2)

Judgment

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,844.

UNITED STATES OF AMERICA, *Appellee,*

vs.

DONALD L. WILKINS, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed as to Count One and affirmed as to Counts Two, Three and Four; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Alexandria, with direction to set aside the verdict on Count One and award defendant (appellant here) a new trial on that count, consistent with the opinion of the Court filed herein.

United States Circuit Judge.
HERBERT S. BOREMAN

APPENDIX B(3)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,844.

UNITED STATES OF AMERICA, *Appellee,*

versus

DONALD L. WILKINS, *Appellant.*

Order Denying Rehearing En Banc

Upon consideration of the petition filed on November 30, 1967, by Donald L. Wilkins for rehearing en banc, it is ORDERED that the prayer of said petition be denied.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

SIMON E. SOBELOFF
United States Circuit Judge

HERBERT S. BOREMAN
United States Circuit Judge

ALBERT V. BRYAN
United States Circuit Judge

HARRISON L. WINTER
United States Circuit Judge

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

JOHN D. BUTZNER, JR.
United States Circuit Judge

A true copy,
Teste:
MARGARET L. DAVIS,
Chief Deputy Clerk,
U. S. Court of Appeals for the
Fourth Circuit.

APPENDIX C

Statistical Summary and Index of Stenographic Transcript of Trial

	Pages
I. Government's Opening Statement	
A. In re Count 1	Vol. V 61-67, 70
B. In re Counts 2, 3, & 4	67-70, 71
II. Government Witnesses	
A. Testified in re Count 1 exclusively	
1) Mr. Rosenbaum	92-102, 111-19 141-44
2) Mr. Banks (qualified exhibits)	146-56, 169-70
3) Mr. Wright	171-75
4) Mr. Clem	177-79
5) Mr. Martin	179-88
6) Mr. Christie	203-06
7) Mr. Helwig (qualified exhibits)	208-09
8) Mr. Hickey	212-22
9) Mr. O'Boyle	229-35
10) Mrs. McCormick (qualified exhibits)	Vol. VI 4-6
11) Mr. Runyon (qualified exhibits)	9-11
12) Mr. Walker	11-17
13) Mr. Wood	78-86, 88
B. Testified in re Counts 2, 3, & 4 exclusively	
1) Mr. Zuckerman	38-48
2) Mr. Hornstein	55-60
3) Miss Batts	67-71
4) Mr. Curry	91-95, 107-09
5) Mrs. Coleburn (qualified exhibits)	110-14
6) Mr. Brotman	115-16, 122-23
7) Mr. Osnos	124-25
8) Mr. O'Brien	134-35

C. Testified in re all four counts

1) Mr. Burch (qualified exhibits) 20-23

2) Mr. Knee
   a) re Count 1 140, 145
   b) re Counts 2, 3, & 4 141-46

3) Mr. Hutnick
   a) re Count 1 Vol. VII 5-35, 131-34
   b) re Counts 2, 3, & 4 36-39

III. Government Exhibits

A. In re Count 1—30 (11 were multiple exhibits)
B. In re Counts 2, 3, & 4—19 (2 were multiple exhibits)
C. In re all four counts—2 (1 was a multiple exhibit)

IV. Testimony of Government Witnesses

A. transcript pages in re Count 1 130
B. transcript pages re Counts 2, 3, & 4 48
C. transcript pages in re all four counts 4

V. Closing Argument of Government

A. In re Count 1 Vol. VIII 105-22, 145-46
B. In re Counts 2, 3, & 4 123-28, 149-50

VI. Court's Charge to the Jury

A. In re Count 1 155-58
B. In re Counts 2, 3, & 4 159-63
C. In re all four counts 174

VII. Supplemental Charge to the Jury

A. In re Count 1	Vol. IX 7-8, 11-13
B. In re Counts 2, 3, & 4	8-11

VIII. Totals

A. transcript pages in re Count 1	167
B. transcript pages in re Counts 2, 3, & 4	70
C. transcript pages in re all four counts	5

AFFIDAVIT

District of Columbia: ss

A. Robert Cherin, being first duly sworn deposes and says that the foregoing statistical analysis of the stenographic transcript of trial in the United States District Court for the Eastern District of Virginia in the case of United States v. Wilkins set forth in Appendix C, is true and accurate to the best of his knowledge and belief.

A. ROBERT CHERIN
A. Robert Cherin

Subscribed and sworn to before me this 3rd day of January, 1968.

JEAN I. MORGAN
Notary Public

[SEAL]

My commission expires Aug. 31, 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 998

DONALD L. WILKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the Eastern District of Virginia on four counts of wilfully attempting to evade his own and his wife's joint income taxes for the years 1960 through 1963, in violation of Section 7201 of the Internal Revenue Code of 1954 (Pet. 1a–2a, 19a; I.R.).[1] Petitioner is an attorney with experience in corporate management and as an editor for a tax service. His wife, also an attorney, was a county supervisor (Pet. 17a).

[1] The record in this Court consists of eleven numbered volumes, the last eight of which are separately paginated. Volume I contains the pleadings and orders in the courts below; Volume II contains the defendant's exhibits; and Volume III contains the government's exhibits. None of these three volumes is paginated. References will be given to the pertinent volume, with the page numbers where possible.

289-488—68

Petitioner owned a home on a 32-acre tract. In 1956 a portion of the property was taken in condemnation proceedings and the remainder was split into two separate tracts. Petitioner received a condemnation award of $15,568.50 at the time of the taking (Pet. 2a–4a).

In 1958 he subdivided one of the remaining tracts and entered into a contract to sell 25 lots to a builder for $112,500. Petitioner was to install sewers and streets, and payments were to be made by the builder out of the proceeds from sales of the lots (Pet. 2a–3a; III R., Exh. 6). Petitioner received payments of $14,236.25 in 1958, $55,500 in 1959, and $37,000 in 1960 from the builder (Pet. 2a–3a; III R., Exh. 3A; V R. 214). In 1959 petitioner sold four additional lots for which he received $2,229.70 and a note for $14,800, which he collected in 1960 (Pet. 3a; III R., Exh. 3B; V R. 141). No mention of any of this income appeared in petitioner's tax returns prior to that for 1959, to which he attached a note stating that all of the income subsequent to the condemnation award arose out of a "continuing transaction" which would be reported when completed (Pet. 3a; III R., Exh. 1D). Petitioner purported to report all such income in his 1960 return (Pet. 3a; III R., Exh. 1E). However, he omitted approximately $39,000 in proceeds from the sale of the lots, overstated subdivision expenses by about $16,000, and overstated the costs of obtaining the condemnation award by some $7,000 (Pet. 4a; VI R. 223–237, 241). An additional $4,000 understatement of taxable income for 1960 resulted from petitioner's omission of interest income, omission of his

wife's salary, and overstatement of deductions for interest expense and for automobile depreciation (Pet. 4a).

In 1961 the other remaining tract of land, on which petitioner's house was located, was leased for 99 years to a corporation, United Properties, for a total rental of $2,213,820. Under this lease petitioner received $22,590 in 1961, $22,590 in 1962, and $18,072 in 1963, all of these amounts being recorded in the books of United Properties as payments of rentals. Petitioner, however, did not report them as income in his returns for those years. When questioned by IRS agents, he stated that these payments were non-taxable since he had an agreement with the lessee, not reflected in the lease, that the payments for the first three years actually constituted purchase money for his house, and since he planned to use said money for another dwelling to replace the one allegedly being sold to the corporation. As proof, petitioner furnished to the agents a document, dated August 15, 1961, purporting to be such an agreement. At trial this document was shown to have been prepared in 1964, after the institution of the IRS investigation (Pet. 11a–12a; VI R. 53, 69–71, 75, 144; VII R. 62).

Despite petitioner's election to treat the income from the sale of the lots as a "continuing transaction" reportable in 1960 when finally completed,[2] the court

[2] The government's theory on the 1960 count, incorporated by the trial court in its charge to the jury (Pet. 10a; VIII R. 157), was that petitioner had properly elected to report the lot sales as a "completed contract" under Treas. Reg. Sec. 1.451–3(a), (b)(2) (26 C.F.R. 1.451–3). The court of appeals (Pet. 6a–

of appeals reversed the conviction on the 1960 return count on the ground that most of this income was attributable to earlier years, that petitioner had a right to show that there was no tax deficiency for 1960, and that the attribution of such income to 1960 was prejudicial to his conviction on that count (Pet. 5a–11a, 20a). Petitioner's conviction was affirmed on the other three counts (Pets. 18a, 20a), and a petition for rehearing was denied by the court *en banc* (Pet. 21a).

DISCUSSION

1. Petitioner contends (Pet. 7–16) that the court of appeals erred in approving an instruction of the trial court (VIII R. 165; IX R. 15–16) to the effect that the jury could infer that petitioner intended the natural and probable consequences of all acts knowingly done, unless the evidence led the jury to a contrary conclusion.[3] In substance, petitioner's argument is that the decision below, which relied upon *Sherwin* v. *United States,* 320 F. 2d 137 (C.A. 9), certiorari denied, 375 U.S. 964, rehearing denied, 376 U.S. 946, is in conflict with *Mann* v. *United States,* 319 F. 2d 404 (C.A. 5), certiorari denied, 375 U.S. 986.

Sherwin and *Mann* were before this Court con-

11a) rejected the government's argument that petitioner's transaction differed from that involved in *Wood* v. *Commissioner*, 245 F. 2d 888 (C.A. 5), where the court held that profits from subdivision sales should be reported annually, and accordingly reversed the conviction on this count on the authority of *Sansone* v. *United States*, 380 U.S. 343, 351, and *Lawn* v. *United States*, 355 U.S. 339, 361 (Pet. 5a).

[3] At the trial, defense counsel specifically disclaimed any objection to the charge as given (VIII R. 175).

temporaneously during the 1963 Term, and the government opposed certiorari in both cases[4] on the ground that, despite the superficial conflict, there was no necessary inconsistency between the two decisions in view of the dissimilarity in the evidence at the respective trials. Both petitions were denied.[5] In the instant case, as in *Sherwin,* there was evidence that petitioner had deliberately falsified records, and the jury was repeatedly and emphatically charged on the distinction between wilful fraud and negligent or careless oversight (Pet. 16a–17a; VIII R. 153–167; IX R. 8–16). In these circumstances, we cannot see how the court's charge could somehow have given the jury the idea that the burden of proof on the issue of intent had been shifted from the prosecution to the defense. In a very similar case the Fifth Circuit itself has distinguished its prior holding in *Mann. Helms* v. *United States,* 340 F. 2d 15, 18–19, certiorari denied, 382 U.S. 814.[6] Moreover, the model instruction (Pet. 14) which was used in the *Mann* case has now been revised. See Mathes and Devitt, *Federal Jury Practice and Instructions, Civil and Criminal,* Par. 10.06 (1965). In sum, review in this Court as to the propriety of the instruction given is not warranted.

2. Petitioner further contends (Pet. 16–27) that the evidence of pre-1960 income, which the court of

[4] The government's petition in the *Mann* case was only conditional upon the grant of the petition in *Sherwin.*

[5] Certiorari was denied in *Sherwin*, No. 519, 1963 Term, on January 6, 1964, and in *Mann*, No. 662, 1963 Term, on January 13, 1964.

[6] Cf. *Hardaway* v. *United States*, 321 F. 2d 89 (C.A. 5), certiorari denied, 376 U.S. 950.

appeals held to be prejudicial as to the 1960 return count, also affected the 1961, 1962 and 1963 return counts and calls for a reversal as to them as well. We recognize that the court of appeals concluded (Pet. 10a–11a) that the evidence of petitioner's pre-1960 transactions, admitted by the trial court as proof of unreported 1960 income, might have been the basis for the jury's finding of guilt on the 1960 count despite the fact that there was other independent evidence upon which such a verdict could have rested. However, the court of appeals was careful to point out (Pet. 18a) that the pre-1960 transactions had no effect upon the verdict on the 1961, 1962 and 1963 counts. In this determination, we submit, the court of appeals was clearly correct.

In the first place, the evidence as to the 1960 count was, as has already been noted (*supra,* pp. 2–3), quite separate from that relating to the 1961, 1962 and 1963 counts. The alleged unreported income for 1960 came from transactions involving one tract of land, while that for 1961, 1962 and 1963 came from transactions involving another piece of property. There was, therefore, little danger that the evidence on the 1960 count would "permeate" (Pet. 17–18) the entire case, provided the jury was properly instructed that each count must stand on its own. Here such an instruction was given by the trial court, clearly and repeatedly (VIII R. 152–153, 155–163, 174–175; IX R. 7–12), and it must be presumed that the jury conscientiously observed the admonitions of the trial court. *Delli Paoli* v. *United States,* 352 U.S. 232, 240–241; *Opper* v. *United States,* 348 U.S. 84, 95; *United States*

v. *Harris,* 211 F. 2d 656, 659 (C.A. 7), certiorari denied, 348 U.S. 822.

Moreover, consideration by the jury of the evidence relating to pre-1960 transactions was not in any event improper, since such evidence plainly bore on the issue of petitioner's intent as to the 1961, 1962 and 1963 counts.[7] It is undisputed that the full amount of the income from the pre-1960 transaction was never reported, either in 1960 or before, and it is well settled that a prior act of a similar nature may be proved to demonstrate intent and purpose. *Glasser* v. *United States,* 315 U.S. 60, 81; *United States* v. *Taylor,* 305 F. 2d 183, 185 (C.A. 4), certiorari denied, 371 U.S. 894; *Yarborough* v. *United States,* 230 F. 2d 56, 63–64 (C.A. 4), certiorari denied, 351 U.S. 969; *United States* v. *Alker,* 260 F. 2d 135, 157 (C.A. 3), certiorari denied, 359 U.S. 906; *Herskovitz* v. *United States,* 209 F. 2d 881, 885 (C.A. 2).

Here, in view of the particular circumstances and the nature of the 1960 count, the introduction of evidence relating to the pre-1960 transactions may have been prejudicial in regard to whether there was a tax deficiency for 1960. But such evidence was not improperly admitted on the question of petitioner's overall intent to evade taxes. Were the case retried without the 1960 count, it seems clear that the evidence about which petitioner complains would be ad-

[7] Although petitioner does not mention it, such an instruction was given to the jury (IX R. 11). And in denying a new trial the trial judge commented (X R. 28): "Certainly, for the purpose of showing intent, it would have been proper for the government to have referred to these other matters."

missible to show his intent in 1961, 1962 and 1963 and the wilfullness of the violations charged in those counts (see Pet. 8a).

In view of the foregoing, it is respectfully submitted that the petition for certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General,
MITCHELL ROGOVIN,
Assistant Attorney General,
JOSEPH M. HOWARD,
JOHN P. BURKE,
Attorneys.

FEBRUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968